(7)

No. 96-1291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DOLORES M. OUBRE,

Petitioner,

v.

ENTERGY OPERATIONS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

THOMAS R. MEITES, ESQ.
Counsel of Record
PAUL W. MOLLICA, ESQ.
MEITES, FRACKMAN, MULDER & BURGER
208 South LaSalle Street
Suite 1410
Chicago, Illinois 60604
(312) 263-0272

Attorneys for Amicus Curiae

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

33 pp

QUESTION PRESENTED

Whether the petitioner ratified an otherwise invalid release by retaining compensation paid and/or failing to tender back said sums received pursuant to the terms of her separation of employment, thus making the release binding.

LIST OF PARTIES

1. Dolores M. Oubre, Petitioner.

2. Entergy Operations, Inc., Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Caselaw PAGE

Statutes

Other Authority

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered November 6, 1996, is not reported. The opinion of the United States District Court, Eastern District of Louisiana, rendered May 28, 1996, is also not reported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion and entered judgment on November 6, 1996. The petitioner filed a timely Petition for Writ of Certiorari within 90 days of the judgment pursuant to 28 U.S.C. §§ 1254 and 2101(c) and Supreme Court Rule 10(c). This Court has jurisdiction under 28 U.S.C. § 1254(b).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This action involves the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626, as amended by the Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. 101-433, Title II, § 201, 104 Stat. 983 (1990), now incorporated at 29 U.S.C. § 626(f).

INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 2,000 lawyers who represent employees in labor, employment and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees and applicants on claims arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other *amici*. Some of the more recent cases are *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996); *McKennon v. Nashville Banner Co.*, 115 S. Ct. 879 (1995); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Hazen Paper Co. v. Biggins*, 508 U.S. 948 (1993).

NELA has an interest in the issues raised in this appeal because a substantial number of the cases in which its members are involved pose the issue of whether a plaintiff must tender back consideration supposedly received for a putative release or waiver of claims under the federal anti-discrimination statutes before challenging its validity. Although this case arises under the particular terms of the ADEA and the OWBPA, the issue recurs under other federal employment laws such as Title VII and the Americans With Disabilities Act. The brief argues that equitable and public policy considerations weigh against application of tender back and ratification to releases of federal anti-discrimination claims of all stripes.

The position NELA takes in the following brief has not been approved or financed by petitioner or her counsel.

The written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

STATEMENT OF THE CASE

On September 26, 1995, petitioner Dolores Oubre, a former employee of Entergy Operations, Inc., filed suit in the United States District Court for the Eastern District of Louisiana. She claimed that her former employer (the respondent in this case) terminated her in violation of the federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (ADEA). The district court granted summary judgment to the employer on May 23, 1996 on the ground that the employee signed a release at the time of her termination and ratified the release by failing to return the benefits of her severance package. The United States Court of Appeals for the Fifth Circuit affirmed this decision by unpublished opinion on November 6, 1996.

INTRODUCTION

Will employers sometimes mislead, confuse or coerce their employees into releasing their rights to sue under the federal anti-discrimination laws? Let us look at three such cases:

- Employee Pierce was offered a severance package as part of a reduction in force, which included a general release and waiver of claims. He had already filed an EEOC charge against the company, alleging race and age discrimination, and asked a company official whether the release would preclude his discrimination claims. The official said he did not believe it would and the company reconfirmed that view later. Pierce had just one business

day to accept the package. A jury found that the release signed by Pierce was not a knowing and voluntary waiver of his discrimination claims. *Pierce v. The Atchison, Topeka and Santa Fe Ry. Co.*, 110 F.3d 431 (7th Cir. 1997).

- Beadle was a police trainee. For religious reasons, Beadle requested that he not be assigned Saturday shifts, to observe his Sabbath. Beadle quit after the police department said no. Under his contract, Beadle was obliged to return $12,000 in training expenses to the city after his "commencement of full-time service as a police officer." The city offered to forgive repayment in exchange for a release of all claims. As it turned out, Beadle probably owed the city nothing under the contract because he had not yet commenced full-time service. A magistrate held that the release was not a knowing and voluntary waiver of his religious discrimination claims. *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir.), *cert. denied*, 115 S. Ct. 2600 (1995).
- Employee Hallas, with 35 years of service, was selected for lay-off. He filed an age discrimination charge with the EEOC. Two months later, a company representative offered Hallas an "early retirement" package on condition that he sign a release. The employer presented the package as a "take it or leave it" proposition and Hallas was not encouraged to seek an attorney's advice. Hallas stood to lose valuable medical benefits at once if he declined the package. He signed the waiver. The Court of Appeals found as a matter of law that Hallas did not knowingly and voluntarily waive his age discrimination claims. *Coventry v. United States Steel Corp.*, 856 F.2d 514 (3d Cir. 1988).

Such cases put in perspective exactly what is at stake with the question presented to this Court. With their

tender back and ratification arguments, the employers seek more than the right to acquire releases or waivers of discrimination claims, a practice that this Court presumed was valid under *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and that Congress has authorized in ADEA cases through the OWBPA. Rather, the employers want this Court's imprimatur on a doctrine that renders releases or waivers "challenge-proof," even when they are clearly invalid and procured through oppression or trickery.

NELA hopes, with this brief, to demystify some of the confusion surrounding the legal concepts of waiver, tender back and ratification. In Section I of the argument, we establish that waivers are treated differently at law than releases and that waivers should not be subject to the rule of tender back that applies to releases. In Section II, we show that tender back is not required when the relief sought is equitable in nature—which is true in federal anti-discrimination cases generally—because courts have the equitable power to fashion conditional decrees to provide a set-off in the employer's favor. Tender back should also be rejected for substantial equitable reasons grounded in public policy, namely the Congressional policy against workplace discrimination and the imbalance of bargaining power in at-will employment relationships. In Section III, concerning the employers' ratification argument, we demonstrate how ratification conflicts with the charge-filing and conciliation requirements under the anti-discrimination statutes and should be rejected.

Properly understood, too, the issues in this case go beyond claims under the ADEA. The issues of tender back and ratification recur under other federal employ-

ment statutes, such as the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.* and the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*[1] And as this Court has noted, "[t]he ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995). The Court should avoid setting a special rule under one particular civil rights statute unless Congress affirmatively requires it. We show below that the doctrines of tender back and ratification are creatures of common law that clash with "the congressional effort to eradicate discrimination in the workplace," *McKennon*, 115 S. Ct. at 884, and, accordingly, that they should not apply to claims under the civil rights statutes.[2]

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[1] *See, e.g., Wittorf v. Shell Oil Co.*, 37 F.3d 1151 (5th Cir. 1994) (ratification under Americans With Disabilities Act); *Fleming v. United States Postal Service*, 27 F.3d 259, 260-62 (7th Cir. 1994) (tender back requirement under Title VII), *cert. denied*, 513 U.S. 1085 (1995); *Jordan v. Smithkline Beecham, Inc.*, No. 95-5707, 1997 WL 164277, at *6 (E.D. Pa. April 2, 1997) (Title VII and 42 U.S.C. § 1981); *Blackwell v. Cole Taylor Bank*, No. 96 C 0902, 1997 WL 156483, at *3 (N.D. Ill. March 31, 1997) (Title VII and ADEA); *Nigrelli v. Catholic Bishop of Chicago*, No. 84 C 5564, 1994 WL 240558, at *4 (N.D. Ill. May 27, 1994) (Title VII), *aff'd*, 68 F.3d 477 (7th Cir. 1995); *Melendez v. Horizon Cellular Telephone Co.*, 841 F. Supp. 687, 692 (E.D. Pa. 1994) (Title VII).

[2] Alternatively, NELA requests that the Court specifically reserve the question of whether tender back or ratification apply to statutes other than the ADEA. *See Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (expressly reserving question whether the Federal Arbitration Act § 1 excluded certain kinds of employment contracts).

ARGUMENT

I. THE TENDER BACK AND RATIFICATION DOCTRINES SHOULD NOT APPLY TO WAIVERS OF ANTI-DISCRIMINATION RIGHTS

Lawyers, courts and commentators often speak of "waivers" and "releases" as if they are the same thing. They are not, and resolving the confusion is important in this case. A release—as one district court put it—is "an abandonment of a claim that might otherwise be enforced; it constitutes a defense to the assertion of a claim." *McCray v. Casual Corner, Inc.*, 812 F. Supp. 1046, 1048 (C.D. Cal. 1992). Releases are a species of contract which must be supported by consideration. *See, e.g., United States for Use of Youngstown Welding and Engineering Co. v. Travellers Indemnity Co.*, 802 F.2d 1164, 1167 (9th Cir. 1986) ("a release must be supported by consideration"); *Premier Electric Int'l Corp. v. Solar Devices, Inc*, 778 F.2d 71, 73 (1st Cir. 1985) ("under federal law, a valid release must be supported by consideration"). To determine the validity of a release, courts rely on conventional contract principles of assent and consideration, as well as the affirmative defenses of fraud, unconscionability, duress and the like. *Fortino v. Quasar Co.*, 950 F.2d 389, 394-95 (7th Cir. 1991) (Posner, J.) (contrasting releases with waivers).

A waiver is not a contract. Rather, it is a unilateral act with juridical significance: a knowing and voluntary renunciation of a legal right. *See, e.g., United States v. Mezzanatto*, 115 S. Ct. 797, 801 (1995). Although waivers can be included as terms in contracts, they need not be contractual and they are not judged by the contractu-

al standards of consideration and assent. Instead, courts evaluate the validity of waivers based on whether they were entered into knowingly and voluntarily. *Fortino*, 950 F.2d at 394-95.

This Court has wide experience with waivers, principally in the criminal procedural field but also occasionally in civil cases. In *Town of Newton v. Rumery*, 480 U.S. 386, 397-98 (1987), the Court reviewed a written release-dismissal agreement—in which a prosecutor agreed not to charge a person for a crime in exchange for the person's agreement not to sue—under waiver principles to determine whether it was voluntary, even though it was in the form of a contract. In *Fuentes v. Shevin*, 407 U.S. 67, 94-6 (1972), the Court reviewed a putative waiver of judicial process in a consumer installment contract to decide whether the customer's relinquishment of these rights was voluntary, knowing, and intelligently made under the circumstances.

This Court has previously indicated that relinquishment of anti-discrimination claims under federal law belong in the waiver category rather than the contractual category. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court reviewed a putative waiver of Title VII rights. There, the employer claimed that an employee's union waived his right to bring a Title VII action in its collective bargaining agreement. The Court rejected that argument. On the other hand, it stated that "presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement." *Id.* at 52. This Court noted that "[i]n determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." *Id.* at 52 n.15.[3] Absent from the Court's opinion is any suggestion that prior seeking judicial review of a waiver, the employee must first tender back any consideration received.[4] Indeed, if we comb this Court's waiver cases, we will find no requirement that a party challenging the validity of the waiver must first restore the status quo ante. There is no sign that Ms. Fuentes had to return the furniture she bought on time to the creditor before a hearing on the waiver. And it would have been absurd to require that Mr. Rumery submit to rearrest and prosecution to challenge his waiver of his civil rights claim.

To determine whether a waiver is valid, we look to a variety of factors to determine whether the waiver was

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[3] This waiver approach has been fully observed by a majority of the circuits in Title VII and ADEA cases. *See, e.g., Pierce v. The Atchison, Topeka and Santa Fe Ry. Co.*, 65 F.3d 562, 571 (7th Cir. 1995); *Wright v. Southwestern Bell Tele. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990); *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 462 (9th Cir. 1989), *cert. denied*, 498 U.S. 854 (1990); *Bormann v. AT&T Communications*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 523 (3d Cir. 1988). A minority of circuits, while acknowledging the waiver standard, have applied contract standards to determine the validity of waivers. *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 361 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Shaheen v. B.F. Goodrich Co.*, 873 F.2d 105, 107 (6th Cir. 1989); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 541 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987).

[4] Indeed, not until 1989—fifteen years after *Alexander*—did any federal court report an opinion imposing such an obligation in an employment discrimination case. *Widener v. Arco Oil and Gas Company*, 717 F. Supp. 1211, 1217 (N.D. Tex. 1989).

"truly voluntary," rather than inquire into offer, acceptance and consideration as we do with contracts. *Fortino*, 950 F.2d at 394-95 (in distinguishing release from waivers, court notes that while releases are subject only to contract defenses, such as fraud and duress, waivers are to be judged by whether the abandonment of the claims was "truly voluntary"). A common articulation of the waiver test appears in *Coventry v. United States Steel Corp.*, 856 F.2d 514 (3d Cir. 1988). There, faced with a putative waiver of a Title VII claim, the Third Circuit considered the following factors relevant to whether the waiver was voluntary:

> 1) the plaintiff's education and business experience, 2) the amount of the time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Id. at 523 (quoting *EEOC v. American Express Publishing Corp.*, 681 F. Supp. 216, 219 (S.D.N.Y. 1988)). The federal courts of appeals largely agree on these factors as relevant to adjudicating the validity of a waiver of anti-discrimination claims.[5]

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[5] *Pierce v. The Atchison, Topeka and Santa Fe Ry. Co.*, 65 F.3d 562, 571 (7th Cir. 1995); *Wright v. Southwestern Bell Tele. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990); *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 462 (continued...)

Looking upon these employer-employee agreements as waivers, we can now appreciate why the tender back rule should not bar challenges to their validity. The willingness or ability of the employee to return consideration at best only marginally bears on the critical issue of whether the original waiver was knowing and voluntary. Indeed, economic considerations—that the employee cannot afford to return the consideration—weigh at least as heavily (and probably more so) in severance situations. We also see that nothing in this Court's waiver decisions, such as *Fuentes* and *Alexander*, sets the stage for a tender back rule. Finally, as shown above, *Alexander* considered the relinquishment of anti-discrimination rights an important enough event to require proof of an individual, knowing and voluntary waiver. In sum, under standard waiver analysis, a party should be able to submit a putative waiver to a court for review without first returning the consideration. And as shown in the next section, if the employee prevails in his challenge to the waiver and on the merits of this claim, the court can use its equitable powers to condition a decree upon the return of consideration.

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[5] (...continued)
(9th Cir. 1989), *cert. denied*, 498 U.S. 854 (1990); *Bormann v. AT&T Communications*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989).

II. THE COURT SHOULD EXERCISE ITS EQUITABLE POWER TO EXCUSE TENDER BACK OF CONSIDERATION TO CHALLENGE RELEASES OF ANTI-DISCRIMINATION CLAIMS

Section I of this argument concluded that there is no tender back barrier to testing the validity of a waiver. If the Court nonetheless determines that contractual, rather than waiver, standards apply to relinquishment of claims under anti-discrimination statutes, then it must confront the tender back issue. As we will see in this section, several considerations grounded in equity and public policy weigh against tender back in actions involving releases of federal anti-discrimination claims.

First, tender back does not apply to actions seeking equitable relief. The tender back rule was a creature of law rather than equity. While a party at law seeking rescission of a contract was generally required first to offer to return anything received before commencing suit, "[i]n equity, his failure to make such an offer before commencing a suit for rescission did not preclude relief." RESTATEMENT (SECOND) OF CONTRACTS § 384 cmt. b (1981). *See also* RESTATEMENT OF RESTITUTION § 65, cmt. d (1937) ("in equity, ... there need be no offer to restore antecedent to the proceedings"); Dan B. Dobbs, HANDBOOK OF THE LAW OF REMEDIES § 4.8 at 294 (1973) (plaintiff in equity "has no obligation before suit to make restitution of goods or money he received from the defendant"). The Restatement of Contracts declares that the availability of equitable relief excuses the tender back requirement:

> Where specific restitution is allowable under the rule stated in § 489, or where equitable relief of other kinds is allowable, an offer to restore what has been received by the injured party, is not a condition of the right to a decree. The decree of the court will impose such conditions on the defendant's duty of restitution with reference to the return of performance or its value as justice requires, and if these conditions are not complied with the plaintiff cannot obtain restitution.

RESTATEMENT OF CONTRACTS § 481 (1932).

History tells us the difference between the rules at law and equity in actions challenging contracts. At law, a party who sought rescission of a contract was required to tender back any consideration because, by so doing, the "plaintiff rescinded [the contract] by his own act and then based his case on a rescission that had been perfected before the action was commenced." George E. Palmer, THE LAW OF RESTITUTION § 3.11, at 295 (1978). On the other hand, if a party sought rescission of a contract at equity, tender back was not required because the rescission (and the obligation to return the consideration) did not occur until the court issued its decree. "Since rescission is not accomplished 'in equity' until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money he received from the defendant." Dobbs, *supra*, § 4.8 at 294.

Equity could afford to open its doors to contract challenges because, unlike law, it had the power to fashion a conditional decree at the end of the proceeding to require return of the consideration (or a set-off of any monetary award) as a condition for an award of relief to plaintiff. As the Restatement (Second) of Contracts declares, in equity a "decree could be made conditional on an offer [of tender]. At law, however, an offer was

traditionally regarded as a condition of the right to commence an action based on recission." RESTATEMENT (SECOND) OF CONTRACTS § 384 cmt. b (1981). *See also* RESTATEMENT OF RESTITUTION § 65 cmt. d (1937) (in equity, where "a conditional decree can be rendered, there need be no offer to restore antecedent to the proceedings").

Of course, as one commentator notes, none of this "mean[s] that the plaintiff is entitled to get back what he gave and keep what he got, too. It means only that he need not make formal tender before suit." Dobbs, *supra*, § 4.8 at 294-95. Courts have plenary powers to fashion an appropriate conditional decree on a finding of liability to provide a set-off in the employer's favor. "Once the matter proceeds to trial, the judge must act to assure that each party is restored to his pre-contract position, at least as far as possible to do so." *Id.* at 295. *See, e.g.*, *Taxin v. Food Fair Stores, Inc.*, 197 F. Supp., 827, 831 (E.D. Pa. 1961) ("[s]hould the plaintiffs ultimately obtain a judgment against the defendants, the latter could be protected by our crediting the amount they paid for the release against the amount of that judgment"); *Falk v. Levine*, 60 F. Supp. 660, 663 (D. Mass. 1945) (in a final decree, equity court may "properly consider the question of interest in ordering the restoration of a status quo"). This is the answer settled upon by the Seventh Circuit in ADEA cases. In *Oberg v. Allied Van Lines*, 11 F.3d 679, 685 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994), the Court held that consideration paid to employees could be setoff at the conclusion of the case. So we should not be concerned that the employer will not ultimately receive equity in the form of a decree or setoff, if it is so entitled.

The exception to tender back in equitable cases applies conclusively to federal anti-discrimination statutes, which provide for equitable as well as legal relief. 29 U.S.C. § 626(b) (courts may "grant such legal or equitable relief as may be appropriate to effectuate the purposes of the [ADEA]"); 42 U.S.C. § 2000e-5(g) (under Title VII, court may order "equitable relief as the court deems appropriate"). While this Court has never passed on the question of whether Title VII actions are equitable or legal for the purposes of the Seventh Amendment jury right, *Landgraf v. USI Film Products*, 511 U.S. 240, 253 n.4 (1994), it has labeled Title VII backpay as equitable. *Local No. 391 v. Terry*, 494 U.S. 558, 571-72 (1990). Moreover, equitable relief for workplace discrimination may also include declaratory relief, injunction of unlawful practices, reinstatement or promotions. *See, e.g.*, 42 U.S.C. § 2000e-5(g)(1) (setting forth various remedies under Title VII). Any such relief could be ordered in a conditional decree, requiring return of the consideration.

Although Title VII was amended in 1991 to allow legal relief (42 U.S.C. § 1981a), the merger of law and equity in American courts erases the distinction between the two broad categories of relief for tender back purposes. The preference in cases seeking both kinds of relief should be to follow equity rather than law. RESTATEMENT (SECOND) OF CONTRACTS § 384 cmt. b ("[t]he merger of law and equity and modern procedural reforms have made this distinction undesirable, and the rule stated in this Section reflects increasing criticism of this rule at law"); Palmer, *supra*, § 3.11 at 297 ("though acknowledging contrary authority, a court *should* hold that the equity practice applies to all actions, without

regard to their historical origins in law and equity"). Employees with anti-discrimination claims should not be denied their opportunity to seek equitable relief by operation of a rule that sprouted in legal soil.

Applying the equitable rule works especially well with challenges to putative releases of anti-discrimination claims. In Ms. Oubre's case, as well as most others reported, the severance or early retirement packages offered as consideration for releases are almost always money. Often, the severance is part of a reduction in force, which cuts off the employee's livelihood unexpectedly. The severance package is a lifeline to employees cut adrift from their jobs, which will (one hopes) tide them over until they find other work. This money, we might expect, is often spent as a substitute for wages lost on account of a sudden and unexpected period of unemployment: on living expenses, college tuition, mortgages and the like. Employers do not face a comparable hardship of having to meet expenses on a paycheck. Thus, any prejudice to an employer of having to wait until the end of the lawsuit to obtain a setoff for moneys paid for a release is substantially outweighed by the harm to employees of having to tender the payments back before even filing a lawsuit.

Second, the Court should also consider the retarding effect that tender back would have on the enforcement of the federal anti-discrimination laws. In *Hogue v. Southern Ry. Co.*, 390 U.S. 526 (1968), the Court held that in a Federal Employers' Liability Act case, an employer could not require return of a settlement amount (in that case, just $105.00) as a precondition of suit. The Court first noted that federal law applied to the issue (*id.* at 517). It then held that under federal law, tender back

was generally not required when there is a defense alleged against enforcement of the contract, including duress, fraud, and mutual mistake. *Id.* Tender back, the Court reasoned, would interfere with the railroad employees' right to recover just compensation for their injuries. *Id.* at 518. The analysis is no less true under the anti-discrimination statutes: tender back is an insurmountable obstacle for many who sign a release during a reduction in force.

We do not have to speculate whether tender back would damp down civil rights enforcement, because the current split in the circuits furnishes a laboratory for proving what will occur in a tender back regime. Since the beginning of 1991—the year in which the Fourth and Fifth Circuits, respectively in *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991) and *Grillet v. Sears Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991), declared their adherence to the tender back rule in ADEA cases—there have been just six reported opinions in the district courts of those two circuits involving challenges to releases in ADEA cases, all of which foundered on tender back or ratification.[6] By contrast, in the Seventh Circuit alone where

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[6] In the Fourth Circuit: *Blistein v. St. John's College*, 860 F. Supp. 256 (D. Md. 1994) (enforcing release), *aff'd on other grounds*, 74 F.3d 1459 (4th Cir. 1996); *Alphonse v. Northern Telecom, Inc.*, 776 F. Supp. 1075 (E.D.N.C. 1991) (enforcing release). In the Fifth Circuit: *Blakeney v. Lomas Information Systems, Inc.*, 879 F. Supp. 645 (N.D. Tex.) (enforcing release), *aff'd*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996); *Wamsley v. Chaplin Refining & Chemicals Inc.*, 11 F.3d 539 (5th Cir. 1993) (enforcing release), *cert. denied*, 115 S. Ct. 1403 (1994); *Wittorf v. Shell Oil Co.*, 37 F.3d 1151 (5th Cir. 1994); *Norton v. Houston Industries Inc.*, 65 Empl. Prac. Dec. (CCH) ¶43,252 (S.D. Tex. 1994) (enforcing release).

there is no tender back rule for ADEA cases,[7] there have been ten challenges to such releases reported in the same period, seven of which avoided dismissal or summary judgment.[8] This experience suggests that the rules advocated by respondent indiscriminately discourage even valid claims that an employer overreached in obtaining a release.

The release issue reaches beyond merely private disputes between employers and employees. This Court and Congress recognize that workplace discrimination is not purely a private matter. These cases are imbued with a public interest to enforce America's anti-discrimination

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[7] *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir.), *cert. denied*, 511 U.S. 1108 (1993). *But see Fleming v. United States Postal Service*, 27 F.3d 259 (7th Cir. 1994) (applying tender back rule to Title VII claim).

[8] *Blackwell v. Cole Taylor Bank*, No. 96 C 0902, 1997 WL 156483 (N.D. Ill. Mar. 31, 1997) (no tender back required in Title VII and ADEA case); *Tice v. American Airlines, Inc.*, No. 95 C 6890, 1997 WL 80911 (N.D. Ill. Feb. 21, 1997) (no tender back required); *Daly v. Runyon*, No. 95 C 5954, 1996 WL 754112 (N.D. Ill. Jan. 30, 1997) (finding no waiver of claim); *Bibel v. Ridgewood High School*, No. 96 C 3110, 1996 WL 568785 (N.D. Ill. Oct. 3, 1996) (release enforced); *EEOC v. Spiegel, Inc.*, No. 90 C 6363, 1993 WL 34749 (N.D. Ill. Feb. 9, 1993) (release enforced); *Pierce v. The Atchison, Topeka and Santa Fe Ry. Co.*, 91 C 3776, 1993 WL 18437 (N.D. Ill. Jan. 26, 1993), *aff'd in part, vacated and remanded in part*, 65 F.2d 562 (7th Cir. 1995), *appeal after remand*, 110 F.3d 431 (7th Cir. 1997) (release not enforced); *Seward v. B.O.C. Div. of General Motors Corp.*, 805 F. Supp. 623 (N.D. Ill. 1992) (release enforced); *Oberg v. Allied Van Lines, Inc.*, 59 Empl. Prac. Dec. (CCH) ¶41,706 (N.D. Ill. 1992) (release not enforced), *aff'd*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Collins v. Outboard Marine Corp.*, 808 F. Supp. 590 (N.D. Ill. 1992) (release not enforced); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1559 (C.D. Ill. 1991) (release not enforced).

laws. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("[t]he private right of action remains an important part of Title VII's scheme of enforcement, . . . [and] Congress considered the charging party a 'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself"); *Alexander*, 415 U.S. at 45 ("Congress gave private individuals a significant role in enforcement process of Title VII"). Although the EEOC has authority to institute civil actions in federal courts on behalf of charging parties (42 U.S.C. § 2000e-5(f)), this authority was crafted "to supplement, not replace, the private action" available to aggrieved persons. *See General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980). The nation's efforts to enforce anti-discrimination laws in the workplace are compromised if employers can privately negotiate an economic disincentive against victims who might otherwise seek relief, and then enforce even unlawful bargains on grounds of tender back or ratification.

Third, another public policy consideration opposed to tender back is that releases of anti-discrimination claims are often formed under conditions where there is a great imbalance of bargaining power. The Court may recognize the relevance of bargaining power from its two 1972 decisions about the standard that applies to enforcement of a waiver of judicial process under state replevin statutes: *Fuentes v. Shevin*, 407 U.S. 67, 94-5 (1972), and *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185-86 (1972). The Court noted in both cases that the balance of bargaining power between contracting parties is an important factor in assessing the knowing and voluntary nature of the waiver. In *Fuentes*, the Court considered in two consolidated appeals the due process

implications of replevin statutes that allowed creditors to seize merchandise without notice and a hearing. The creditors argued in each case that the debtors signed sales contracts that specifically allowed pre-judgment repossession. But the Court held that the contracts, under the circumstances, did not present an effective waiver: "There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power." *Fuentes*, 407 U.S. at 95. By contrast, in *D.H. Overmyer*, the Court enforced a contractual waiver of prejudgment notice and hearing under a financing contract. There, the defaulting party was a major corporation. This was not a case of unequal bargaining power or overreaching, the Court held, yet "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue." *D.H. Overmyer*, 405 U.S. at 188. Releases of anti-discrimination claims will ordinarily fall more toward the *Fuentes* pole than the *D.H. Overmyer* pole. In Ms. Oubre's case and many others, the waivers obtained from employees during reductions in force are offered (as in *Coventry*) on a "take-it-or-leave-it" basis to people whose primary source of income is about to be cut off. The lack of bargaining power under these circumstances is another powerful argument against tender back.

For all of the above reasons, we urge the Court to find that tender back does not apply to releases of anti-discrimination claims as a matter of equity.

III. RATIFICATION SHOULD NOT APPLY TO RELEASES OF ANTI-DISCRIMINATION CLAIMS BECAUSE THE EEOC CHARGE FILING REQUIREMENTS PROVIDE THE EXCLUSIVE TIMING RULES

The principle of ratification states that where a contracting party learns of a basis for invalidating a contract (such as fraud or misrepresentation) but does not take prompt steps to do so, the court may enforce the contract in spite of the defects:

> The power of a party to avoid a contract for misrepresentation or mistake is lost if after he knows of a fraudulent misrepresentation or knows or has reason to know of a non-fraudulent misrepresentation or mistake he does not within a reasonable time manifest to the other party his intention to avoid it.

RESTATEMENT (SECOND) OF CONTRACTS § 381(2) (1981). A typical formulation of this rule is found in *FDIC v. Aetna Casualty & Surety Co.*, 947 F.2d 196, 203 (6th Cir. 1992): "the power of avoidance may be forfeited if the party who was induced by fraud to enter into the agreement unreasonably delays avoiding the contract."[9] The question presented in this case asks whether it is proper to import this concept of "unreasonable delay" into the anti-discrimination arena.

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[9] The doctrines and policies of tender back and ratification are very closely related and are often presented in tandem. *See Long v. Sears, Roebuck & Co.*, 105 F.3d 1529, 1536 (3d Cir. 1997) (reviewing tender back and ratification arguments); *Pierce*, 65 F.3d at 572 n.2 (failure to return the consideration where tender back was not required also did not constitute a ratification). As with tender back, NELA urges that the ratification rule be rejected because it would interfere with the enforcement of anti-discrimination statutes and insulate unfair and oppressive releases from any judicial review.

Ratification should be rejected in the anti-discrimination context because Congress already established a comprehensive scheme for the timing of these complaints. If an employee seeks to bring a federal employment discrimination action, he or she must file a charge within 180 to 300 days of the alleged discriminatory practice.[10] In the case of a reduction in force, for instance, this means that employees must file a charge within 180 or 300 days of when the termination decision was communicated to the employee. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). The statutes also provide for investigation and conciliation by the EEOC[11] and, if that fails, a private party has 90 days from receipt of the EEOC's final determination to file his or her own lawsuit.[12] A ratification rule would short-circuit this carefully crafted procedure whenever a judge could be persuaded that it would have been "reasonable" for an employee to file a charge or complaint before the time prescribed by the statutes, as (for example) where the EEOC is still investigating a matter.[13] Finally, a challenge to a misleading or fraudulent release (which might otherwise

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[10] 29 U.S.C. § 626(d) (charge filing requirements for ADEA); 42 U.S.C. § 2000e-5(e) (prescribing limitation period for Title VII charges); 42 U.S.C. § 12117 (ADA limitations period adopted from Title VII).

[11] 29 U.S.C. § 626(b) (conciliation under ADEA); 42 U.S.C. § 2000e-5(b) (conciliation under Title VII); 42 U.S.C. § 12117 (ADA procedures adopted from Title VII).

[12] 29 U.S.C. § 626(e) (limitations under ADEA); 42 U.S.C. § 2000e-5(f)(1) (limitations under Title VII); 42 U.S.C. § 12117 (ADA procedures adopted from Title VII).

[13] An ADEA plaintiff may, but is not required to, file a civil action 60 days after filing a charge. 29 U.S.C. § 626(d).

have provided a basis for equitable estoppel or tolling under Title VII (*Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)) could, under the ratification doctrine, be held to come too late to be "reasonable" for purposes of ratification. Such results would contravene Congress's express intentions and would sow doubt about the proper limitations period for anti-discrimination claims. For these reasons, ratification should be rejected.

CONCLUSION

For the foregoing reasons, NELA respectfully requests that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed. We urge that this Court reject the application of tender back and ratification to putative waivers or releases of rights under the federal anti-discrimination statutes.

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Respectfully submitted,

THOMAS R. MEITES, ESQ.
Counsel of Record
PAUL W. MOLLICA, ESQ.
MEITES, FRACKMAN, MULDER & BURGER
208 South LaSalle Street
Suite 1410
Chicago, Illinois 60604
(312) 263-0272

Attorneys for Amicus Curiae